**Kentucky Tennessee Clay Company *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.** Cases 11–CA–18925 and 11–CA–18968

December 8, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, WALSH, AND MEISBURG

On December 28, 2001, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent and the General Counsel both filed exceptions and supporting briefs. The Charging Party filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, and to adopt the recommended Order as modified and set forth below in full.[2]

I.

The Respondent, located in Langley, South Carolina, is engaged in the business of mining and processing kaolin clay. In late 1999, the Union commenced an organizing campaign among the Respondent's maintenance and production employees. The Union won the representation election, which was held in March 2000. The following November, the Board overruled the Respondent's election objections and certified the Union as the collective-bargaining representative of the unit employees. In a related proceeding, the Board found that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with or to supply requested information to the Union after it had been certified as the collective-bargaining representative. 334 NLRB No. 33 (2001) (not reported in Board volumes). The United States Court of Appeals for the Fourth Circuit, however, found on review that the Respondent's election objections were meritorious and that the Union should not have been certified as the bargaining representative. The court accordingly denied enforcement of the Board's Order. *NLRB v. Kentucky Tennessee Clay Co*., 295 F.3d 436 (4th Cir. 2002).

On May 23, 2001, the Acting General Counsel issued a consolidated complaint in the present case, based on unfair labor practice charges the Union had filed the preceding January and March, alleging violations of Section 8(a)(1), (3), and (5). The Respondent filed an answer denying any wrongdoing and asserting as an affirmative defense that some of the allegations contained in the complaint should be dismissed pursuant to Section 10(b) of the Act.

II.

For the reasons stated by the judge, we conclude that, following the representation election, the Respondent committed numerous 8(a)(1) violations, as alleged in this proceeding. Thus, we affirm the judge's findings that the Respondent, through Supervisor Murray Penner and Plant Manager David Forrester, violated Section 8(a)(1) by: (1) threatening Adelbert Quackenbush and three truckdrivers with discharge in December 2000 if they went on strike; (2) creating the impression of surveillance among its employees in December 2000; (3) threatening employee Patrick Scott on January 15, 2001, with futility in selecting union representation;[3] and (4) threatening employee Renew with discipline for engaging in union and/or protected concerted activity on January 16, 2001.

We further find, like the judge, that the Respondent violated Section 8(a)(3) by reducing employee Scott's work hours in August 2000 and then discharging him in January 2001.

Finally, because the Fourth Circuit has ruled that the underlying representation election was invalid, we reverse the judge's findings that the Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union in December 2000 and by unilaterally chang-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] We shall modify the judge's recommended Order to conform to the requirements of *Indian Hills Care Center,* 321 NLRB 144 (1996), as revised in *Excel Container, Inc.*, 325 NLRB 17 (1997), and we shall substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). We shall also modify the judge's recommended Order and notice to more closely conform to the judge's findings that the Respondent threatened employees with futility in selecting union representation and created the impression of surveillance among its employees.

[3] Given this finding, we need not pass on the judge's finding that Supervisor Penner's March 16, 2000 threatening of employee Myron Renew with futility constitutes a violation of Sec. 8(a)(1) because such a violation would be cumulative and would not affect the remedy. We do, however, affirm the judge's finding that this incident is further evidence of the Respondent's antiunion animus.

We also find it unnecessary to pass on whether Supervisor Penner likewise threatened employee Scott with futility in December 2000, as the General Counsel and the Charging Party did not except to the judge's failure to address this complaint allegation.

Finally, we find it unnecessary to pass on whether Supervisor Penner threatened employee Scott in August 2000 for engaging in union and/or protected concerted activity, as the Respondent's other 8(a)(1) misconduct would make this finding cumulative and would not affect the remedy.

ing certain terms and conditions of employment in late 2000 and early 2001.

III.

The Respondent argues that certain of the unfair labor practice allegations are barred by the 6-month limitations period of Section 10(b), a defense it first raised in its answer to the complaint, but which was not addressed by the judge. The Respondent contends that Section 10(b) bars two aspects of the complaint: (1) various 8(a)(1) threats made by Supervisor Penner and Plant Manager Forrester and (2) the 8(a)(3) reduction in overtime hours to employee Scott in August 2000.[4]

First, we reject the Respondent's contention that the 8(a)(1) misconduct alleged in the amended charge in Case 11–CA–18925 is barred by Section 10(b) because the charge assertedly was not amended until August 22, 2001. The complaint alleged that the unlawful conduct, which included threats of discharge and discipline for engaging in union activity, creation of the impression of surveillance, and threats that choosing union representation would be futile, occurred in December 2000 and mid-January 2001. The record shows that the Respondent is simply mistaken about the date of the amended charge: the original charge in Case 11–CA–18925 was filed on January 20, 2001, and was amended on *March 22, 2001* (not August 22, as the Respondent maintains). Thus, contrary to the Respondent, the 8(a)(1) threat violations that we have affirmed are timely in relation to the amendment to the charge.[5] See generally *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959).

Second, we reject the Respondent's contention that the amended charge alleging the 8(a)(3) reduction of employee Scott's work hours in August 2000 is also barred by Section 10(b). The Respondent's argument hinges on the claim that Scott's reduction in hours occurred in June 2000, not August 2000. Based on Scott's testimony, however, the judge found that Supervisor Penner had informed Scott in August 2000 that he "was going to cut my hours back to forty hours." It is clear from the judge's reliance on Scott's testimony in this regard, that the judge did not credit the Respondent's claim that this reduction in hours occurred in June 2000.

Further, this allegation, based on the credited evidence that it occurred in August 2000, is "closely related" to the otherwise timely filed charge of January 30, 2001, which alleged that the Respondent disciplined and discharged Scott in violation of Section 8(a)(3). See *Nickles Bakery*, 296 NLRB 927, 928 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988) (setting out test of relatedness). Thus, the allegations share a common legal theory, i.e., that both actions (the reduction in hours and the discharge) were motivated by the Respondent's antiunion animus. Next, both allegations arise from the same sequence of events. The Respondent followed through on Penner's remarks about ruining Scott's lifestyle, first by reducing his work hours and then by terminating him in retaliation for his union and/or protected concerted activities. Finally, the allegations involve similar defenses, i.e., whether there was a legitimate, nondiscriminatory reason for the Respondent's treatment of Scott. Accordingly, we affirm the judge's consideration of the allegation that the Respondent violated Section 8(a)(3) by reducing Scott's hours in August 2000.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Kentucky Tennessee Clay Company, Langley, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as set forth in full below.

1. Cease and desist from

(a) Threatening employees with discipline and discharge for engaging in union activities.

(b) Threatening employees with the futility of their selection and support of the Union as their collective-bargaining agent.

(c) Creating the impression of surveillance of the union activities of its employees.

(d) Reducing the work hours of its employees and discharging them because of their engagement in union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the purposes of the Act

(a) Within 14 days from the date of this Order, offer Patrick Scott immediate and full reinstatement to his former position, or if his former position no longer exists, to a substantially equivalent one, without prejudice to his seniority or other rights or privileges previously enjoyed.

[4] Because we have dismissed all the 8(a)(5) complaint allegations, we find it unnecessary to consider the Respondent's contention that certain 8(a)(5) allegations, which were first raised during the hearing, are barred by Sec. 10(b).

[5] The only 8(a)(1) violations apparently found by the judge that occurred more than 6 months prior to the Union's amended unfair labor practice charge were the March 2000 threat of futility and the August 2000 threat of discharge and reprisal made to employee Scott. Having found, as stated above, that the judge's findings as to these allegations are cumulative of the Respondent's other 8(a)(1) violations, we find it unnecessary to address whether Sec. 10(b) bars consideration of these allegations.

(b) Make Patrick Scott whole for any loss of wages or benefits he may have suffered as a result of his unlawful reduction in hours and his unlawful discharge, with interest.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful reduction in hours and discharge of Patrick Scott, and within 3 days thereafter notify him in writing that the unlawful reduction in hours and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 11, post at its mines in its Langley, South Carolina facility copies of the attached notice to employees marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully threaten our employees with discipline or discharge for engaging in union activities.

WE WILL NOT unlawfully threaten our employees with the futility of their selection and support of the Union as their collective-bargaining agent.

WE WILL NOT unlawfully create the impression of surveillance of our employees' union activities.

WE WILL NOT unlawfully reduce the work hours or discharge our employees for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Patrick Scott immediate and full reinstatement to his former position, or if his former position no longer exists, to a substantially equivalent one, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Scott whole for any loss of wages or benefits he may have suffered as a result of his unlawful reduction in hours and his unlawful discharge, with interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful reduction in hours and discharge of employee Patrick Scott and WE WILL, within 3 days thereafter, notify him in writing that the unlawful reduction in hours and discharge will not be used against him in any way.

### KENTUCKY TENNESSEE CLAY COMPANY

*Donald Gattalaro, Esq.,* for the General Counsel.
*Walter O. Lambeth Jr., Esq.,* for the Respondent.
*Michael J. Stapp, Esq.,* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This consolidated case was heard before me on October 17, 2001, in Aiken, South Carolina. The complaint as amended at the hearing was issued by the Regional Director for Region 11 of the

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

National Labor Relations Board based on charges filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (the Charging Party or the Union). An amended charge in Case 11–CA–18925 was filed on March 22, 2001. The charge in Case 11–CA–18968 was filed by the Union on March 22, 2001. The complaint alleges that Kentucky Tennessee Clay Company (the Respondent or the Company) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The complaint is joined by the answer filed by Respondent where it asserts as an affirmative defense that certain of the allegations in the complaint are time barred as having occurred prior to the applicable statute of limitations contained in Section 10(b) of the Act. In its answer Respondent also denies the commission of any violations of the Act.

On the entire record, including the testimony of the witnesses and the exhibits received in evidence and after review of the briefs filed by the parties, I make the following

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. JURISDICTION

The complaint alleges, Respondent admits, and I find that at all times material during the 12 months preceding the filing of the complaint, Respondent has been a Delaware corporation with a facility located at Langley, South Carolina, where it is engaged in the business of mining and processing of kaolin and purchased and received at this facility goods and materials valued in excess of $50,000 directly from points outside the State of South Carolina and sold and shipped from its facility, products valued in excess of $50,000 directly to points outside the State of South Carolina and Respondent is now, and has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### III. THE APPROPRIATE UNIT

The complaint alleges, Respondent admits, and I find that the following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time production and maintenance employees, including mining and processing employees and leadmen employed by the Respondent at its Langley, South Carolina facility: excluding lab technicians, office clerical employees, guards, professional employees and supervisors as defined in the Act.

#### *A. Background*

The Union commenced an organizational campaign of the unit employees at Respondent's facilities in Langley, South Carolina, in late 1999. An election was held on March 15, 2000, which was won by the Union. The Respondent filed objections to the election which were overruled by the Board. *Kentucky Tennessee Clay Co.*, 334 NLRB No. 33 (2001) (not reported in Board volumes) certifying the Union on November 2, 2000, as the collective-bargaining representative of the unit employees. The Respondent has filed an appeal to the United States Court of Appeals, which is currently pending. This case involves the alleged commission of 8(a)(1) and (3) violations as hereinafter set out and of alleged 8(a)(5) violations relating to the Respondent's refusal to recognize the Union and to its institution of unilateral changes, failure to notify the Union and to bargain concerning changes in the terms and conditions of employment of its unit employees.

#### *B. The 8(a)(1) and (3) Allegations*

Patrick Scott testified he was employed by Respondent in December 1997, as a maintenance mechanic and welder. He rebuilt and repaired mobile equipment which moved on tires, wheels, or tracks. This work included the changing of tires, hoses, and bushings. He and fellow mechanic Coley Lamar Wilson worked in the maintenance shop. Scott did most of the welding required. Wilson and Scott generally worked on separate projects but would work together on projects when one of them required assistance. Mobile mechanic Wilson testified he has been employed by Respondent for 34 years. He is in charge of the maintenance shop. Wilson does no welding and testified that Scott did all the welding on the equipment. When the repair jobs called for two men, he would request Scott to help him. Murray Penner became the operations manager for Respondent 3-1/2 weeks prior to the hearing in this case. Prior to this he was the mining, striping, and mobile maintenance supervisor. Scott and Wilson reported to Penner. Prior to Respondent taking over the facility Wilson had held the same position as Penner with six maintenance employees reporting to him in the maintenance shop. Wilson evaluated employees in this position. When Scott was hired, Wilson was directed by Penner to train Scott. Wilson trained Scott to perform the routine maintenance program. He testified as did Scott that Scott was a proficient welder. Wilson who had worked with Scott a little over 3 years testified that Scott was a good worker and would help him as required. Wilson testified he never had any problem with Scott.

Both Scott and Wilson testified they wore prounion buttons about a month prior to the election which was held on March 15, 2000. The buttons said "Vote Yes." Wilson testified that he and Scott met with Penner two or three times a day and that Scott was wearing his prounion button at all times during these meetings. He testified there was no way that Penner could have avoided seeing the button. Scott testified that he started wearing the "vote yes" button a couple of months prior to the election. He wore the button on his jacket and pinned it on his shirt when he removed his jacket. Scott also discussed the Union with other employees and solicited authorization cards for the Union. Employee Myron Renew who holds the union office of President testified that Scott attended and participated in all union meetings held prior to the election and wore a union "vote yes" button. Renew observed Scott wearing the button every day at work. He recalled one occasion when Scott was "tightening down a pipe as part of the environmental committee, where there was a fuel leak" and Murray Penner walked up and Scott had the button on at that time. Penner was within 2 to

3 feet of Scott and was in a position where he could see the button. Renew also testified that Scott was a trustee of the Union's Board and that he sent a document dated January 5, 2001, about that date listing the officers of the Union including Scott as trustee to the Respondent and caused a copy to be placed on the company bulletin board. Penner testified that Scott and Wilson never wore a union "Vote Yes" button but conceded he met with them almost every day. I credit the foregoing testimony of Scott, Wilson, and Renew over the denial of knowledge by Penner and find that Respondent had knowledge of Scott's engagement in protected concerted activities on behalf of the Union as set out above.

The evidence discloses that Respondent committed several violations of Section 8(a)(1) as alleged in the complaint.

Myron Renew testified that on March 16, 2000, the day after the election Supervisor Penner approached him and "told me there would be no union. That he would do everything possible to decertify the union, and that there would be an appeal for an election next March." Respondent filed objections to the election which were overruled by the Board in *Kentucky Tennessee Clay Co.*, supra. I credit Renew's testimony. The foregoing clearly demonstrates Respondent's animus against the Union and is supportive of a finding that Respondent was threatening Renew, a known union supporter, with the futility of the employees' support for the Union.

Wilson testified that in late March or early April 2001, Penner called him over to a truck outside the maintenance shop and asked him "how did I think that the Union would help me." I credit Wilson's testimony. I find that Penner was aware that Wilson wore a prounion button. I find this inquiry of Wilson by Penner is further evidence of Respondent's animus against the Union.

Scott testified that in August 2000, Penner brought him into his office and told him that he (Penner) "was going to cut my hours back to 40 hours. I was not working fast enough for him, and that he was going to ruin my lifestyle. And if I didn't like what he was doing, I could find someplace else to go." Scott testified that he had previously been working 50 to 55 hours a week. The employees had been working five 10-hour days and on occasion they would work five 11-hour days. Scott testified that Penner specifically mentioned his work on the scraper, an earth-moving machine. He testified his work on the scraper took about 1-1/2 months because it was a complex job and bushings were replaced, cut out and repaired and during this period Penner prolonged the job by requesting several additional modifications. Scott also testified that during this time he had also rebuilt a dump truck and assisted Wilson as necessary. Scott also testified that prior to the union campaign he had performed his work in the same manner as later prior to the reduction in his hours and that he had never been criticized by Penner for helping Wilson. Penner for his part testified that he had hired Scott based on a successful interview in which he was favorably impressed by what Scott said he could do. He testified that he believed Scott had the ability but that Scott consistently failed to finish projects in a reasonable time and that Scott would go from one project to another without finishing either one. He testified he spoke to Scott about this problem on a number of occasions and that Scott would normally agree with him and say he would take care of the particular project in question. Penner testified that Scott had worked on the scraper project for 3 months. It is undisputed that Penner did not document Scott's alleged failure to finish the scraper project within a reasonable time. I credit Scott's testimony over that of Penner. I did not find Penner to be a credible witness particularly in view of my finding that he was not truthful in his denial of having seen Scott wearing a union button. It appeared to me that Penner was reaching in attempting to portray Scott as a poor employee. I have little doubt but that the two men had verbally clashed on occasions. However I find Respondent violated Section 8(a)(1) and (3) of the Act when Penner reduced Scott's hours for allegedly working too slow and threatened Scott that he was going to ruin his lifestyle by reducing his work hours and that Scott could go elsewhere if he did not like it here. The threat to Scott was a threat of termination and was violative of Section 8(a)(1) of the Act. I find that Respondent violated Section 8(a)(3) of the Act by the reduction of Scott's hours which I find was motivated in part by Respondent's animus against the Union and its knowledge that Scott was a union supporter. I find that Respondent has failed to demonstrate by the preponderance of the evidence that it would have reduced Scott's hours in the absence of his engagement in protected concerted activities on behalf of the Union. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). There was union activity, employer knowledge, animus and adverse action taken against Scott for his involvement. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

Adelbert Quackenbush, who was employed by Respondent as an operator on April 4, 2000, testified that he was interviewed by Penner on April 3, 2000, who informed him that the Union "had been voted in, and that he didn't know how I felt about the Union." Quackenbush indicated he might not join the Union. Penner told him he "hoped I wouldn't join the Union."

In December 2000, Quackenbush and Wilson were in the breakroom discussing changes they thought the Union would bring to the plant and were overheard by a truckdriver whom Quackenbush testified he believed was against the Union based on prior conversations he had heard expressing antiunion sentiments by the truckdrivers. Shortly thereafter he was approached by Penner who told him he had heard that Quackenbush was trying to change the way Penner was doing things in the plant and that he did not appreciate this. Quackenbush denied trying to change the way Penner was running the mine but conceded he and Wilson were discussing the Union. Quackenbush told Penner he knew where Penner had obtained this information, referring to the truckdriver who had overheard his conversation with Wilson in the breakroom. Penner did not confirm the source of his information.

Quackenbush also testified concerning a meeting held by Penner in the bottom of the mine with him and three truckdrivers. Prior to that time Quackenbush had gone to a union meeting and joined the Union. He testified that the three truckdrivers were against the Union. Penner got up on a tractor with Quackenbush and was looking and talking directly to him rather than to the truckdrivers. He told Quackenbush a story about a place in Georgia where the employees had voted for the Union and after negotiations the employees only netted an 8-

cents increase. Penner also said that if the employees went on strike, he "would fire all the strikers and just rehire." Penner testified concerning a different meeting in December 2000, with several employees in the shop. He testified that in response to a question regarding what would happen if there was a strike, that he replied, "that the company [has] an obligation to our customers to meet their needs and if it actually came down to that, that we would be obligated to replace workers if needed." I credit Quackenbush's testimony over that of Penner. I find that Penner did threaten to fire the employees if they went on strike in violation of Section 8(a)(1) of the Act.

Scott was not scheduled to work on Friday, January 12, 2001, as his hours had been reduced by Penner in August of 2000. Scott had been assigned on Thursday, January 11, 2001, by Penner to assist an outside contractor to examine, pressurize, and relabel all of its fire extinguishers. Scott was to remove the fire extinguishers from the mobile equipment serviced by the maintenance shop, bring them to the contractor and place them back on the mobile equipment from which they had been taken after they were serviced. Penner told Scott to complete the project and report to him after doing so. Although Scott was not scheduled to work on Friday, January 12, 2001, he nonetheless reported for work on that date at 7 a.m. to continue to assist the outside contractor to complete his assignment to assist the outside contractor which assignment he had been given by Penner. At 8 a.m. Wilson told Scott that Penner was looking for him and Scott went to Penner's office. Penner asked Scott why he was at work as he was not scheduled to work that day. Scott told Penner he was there working on the fire extinguishers. Penner said he was "just a phone call away." Scott offered to go home. Penner told him to finish what he was doing and go home. Scott did so. He had several others which had not been started but testified that Penner wanted him just to do the ones he had started which were three to four. He spoke to Myron Renew about this incident and informed Renew that Penner was sending him home and did not want Scott to do the remaining fire extinguishers. On the following Monday, January 15, 2001, Scott came in at his normal time and worked all day. About a quarter until 5 p.m. Penner approached and asked to see the checklist on his truck. Scott asked what he meant and offered to show Penner what he had done and said he had finished it. Penner said, okay and then asked Scott why he had left the fire extinguisher man hanging without telling him he was leaving. Scott replied that the man was a contractor and that it was Penner's responsibility. Penner said you should have had the common courtesy to tell the man you were leaving. They then began to discuss the Union. Scott told Penner that the Union was there now and that Penner would have to do what the Union says. Penner told Scott that you do not have a union. You don't have a contract and you have no rights. At this time Scott called Quackenbush over and asked him if he had heard the comment by Penner and Quackenbush said he had. At the hearing both Quackenbush and Wilson who had also overheard the conversation corroborated Scott's testimony concerning Penner's comments about the Union.

Penner then told Scott to come to his office. Quackenbush said he had to leave and Scott asked Wilson to come to the office with him which Wilson did. In the office Penner told Scott to clock out and go home. Penner testified he told Scott he did not know what he was going to do. After arriving home Scot called Union President Renew and told him that something was going on and he needed help and asked him to help him and meet him at the shop the next day. On that day, January 16, 2001, Renew and P. C. Carroll, the Union's treasurer met him at the shop. When Forester arrived he told Renew he could be in trouble for having spent work time waiting for Forester in the mine shop. Scott went to work and was later called to the office. He was permitted only one witness and he chose Renew. They met with Plant Manager David Forrester and Penner. Forrester asked Scott what he was doing there. Scott replied, "I work here." Scott was told to go home and return at 1 p.m. that day which he did and met in Penner's office with Forrester and Penner with Renew present on his behalf. Forrester spoke during the meeting and said they had tried to work with Scott but were unable to do so and would have to terminate him. Forrester read from a typed written piece of paper a list of alleged offenses committed by Scott in the past but according to Scott and Renew did not give them a copy or permit them to see it. Renew testified he requested a copy but that management refused. Forrester testified that no request was made for a copy of the paper from which he read. The paper had been prepared by the human resources director in Respondent's home office. I credit Renew, a current employee of Respondent. Scott was escorted off the property by Forrester.

### *C. The 8(a)(5) Allegations*

It was stipulated by the parties at the hearing that on November 20, 2000, the Union requested that Respondent bargain with it as the exclusive collective-bargaining representative of the bargaining unit that the Union has never withdrawn this request and the Respondent has never acceded to the request. Union President Renew testified that he had on numerous occasions requested that Respondent bargain with the Union and that Respondent has never agreed to bargain and has made no response to the requests. Renew testified that Respondent has failed to notify the Union prior to making changes in the terms and conditions of employment of the bargaining unit employees. Renew's testimony as set out above was not rebutted by Respondent. Rather Plant Manager Forrester testified that Respondent's position has been consistent that Respondent has no obligation to bargain with the Union. Forrester also admitted that Respondent has not provided the Union with advance notice of any changes in the terms and conditions of employment of the unit employees. Thus it provided the Union with no advance notice prior to changing its vacation policy, eliminating overtime for unit employees during December 2000, laying off five employees on February 19, 2001, and changing the employees' health insurance plan, all of which changes Respondent conceded at the hearing that it had implemented. Forrester further conceded at the hearing that Respondent would not have bargained with the Union if it had demanded to bargain concerning these changes.

## Analysis

### *A. The 8(a)(1) Allegations*

I find that Respondent violated Section 8(a)(1) of the Act by the threat issued by Penner to Scott while reducing Scott's work hours in August 2000. The threat that he was going to ruin Scott's lifestyle in connection with the reduction of Scott's work hours and that if Scott did not like this treatment he could go elsewhere was clearly coercive. I find the evidence of antiunion animus by Penner and the obvious reason for such a threat support a finding that this threat was issued to Scott in retaliation for his support of the Union. *Fontaine Body & Hoist Co.*, 302 NLRB 863, 866 (1991).

I find that Respondent violated Section 8(a)(1) of the Act by the threat issued by Penner to Quackenbush and the three truckdrivers at the December 11, 2000 meeting that if employees went on strike, he would fire them and hire new employees. *Baddour, Inc.*, 303 NLRB 275, 279–280 (1991).

I find the Respondent violated Section 8(a)(1) of the Act by Penner's threat to Scott on January 15, 2001, in the presence of Quackenbush and Wilson that the employees had no union, no contract and no rights. This was a threat of the futility of the employees' support of the Union which had won the election. *Sea Ray Boats, Inc.*, 336 NLRB 779 (2001).

I find that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance in the December 2000 incident when Penner accused Quackenbush of trying to undermine his authority following a discussion with Wilson concerning the Union which was overheard by a truckdriver. This gave rise to the implication that Respondent was monitoring the conversations of its employees, thus giving rise to the inference that the employees' union activities were under surveillance. *Williamson Piggly Wiggly*, 280 NLRB 1160, 1162 (1986), citing *McLean Roofing Co.*, 276 NLRB 830 (1985).

On January 16, 2001, Renew was told by Forrester that he could be in trouble for having spent time waiting in the mine shop for Forrester to arrive. At this time Renew told him that he and Carroll were there in their capacity as grievance representatives on behalf of Scott. I find that this was clearly a threat of discipline for engagement in union activities. As the Respondent had not bargained with the Union and there was no grievance procedure in force, Forrester's threat was violative of Section 8(a)(1) of the Act. *Fleming Cos.*, 336 NLRB 192 (2001).

### *B. The 8(a)(3) Violations*

I find that the General Counsel has established a prima facie case of violations of Section 8(a)(3) of the Act having been committed by Respondent by its reduction in the work hours of Scott and by its termination of Scott. There is substantial evidence in this case of Respondent's knowledge of Scott's support of the Union as found above. There is substantial evidence of antiunion animus by Respondent against the Union and its supporters in view of its continuing refusal to recognize the Union and to bargain with the Union and the 8(a)(1) violations found in this case. I do not credit Penner's testimony concerning Scott's alleged deficiencies as an employee. I find Penner's hostility toward Scott appeared to stem primarily from Scott's support of the Union. The reduction in work hours and the statement that he was going to ruin Scott's lifestyle by reducing his hours are consistent with a broader agenda than merely correcting an employee for working too slow. I credit former Supervisor Wilson's testimony that Scott was a good worker. I credit Scott's testimony that he had not been disciplined in the past for poor work performance and note the absence of documentation of the many job performance deficiencies attributed to Scott by Penner.

With respect to the termination of Scott I find that the termination of Scott was motivated in part by his support of the Union and Penner's hostility to the Union as shown by the 8(a)(1) violations. The particular confrontation that led to the termination was heated and became intertwined with the discussion of the Union and the effects this would have on the operation of the plant. The 8(a)(1) violations committed by Penner clearly demonstrate that he was unhappy with his perceived challenge by the Union as noted in Quackenbush's testimony that Penner stated on two occasions in reference to the Union that what he (Penner) says, goes.

I find that the General Counsel has established that the Respondent had knowledge of Scott's support of the Union, had animus against the Union, took adverse actions against Scott by reducing his work hours and by terminating him and that the antiunion animus of Respondent was a substantial motivating factor in the imposition of the adverse actions taken against Scott by Respondent. I find that Respondent has failed to rebut the prima facie cases by the preponderance of the evidence. *Wright Line*, supra; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

### *C. The 8(a)(5) Violations*

I find the undisputed evidence clearly establishes the 8(a)(5) violations in this case. Since March 15, 2000, the Union has been the collective-bargaining representative of its employees and was certified by the Board on November 2, 2000. The Respondent has refused to recognize and bargain with the Union and has unilaterally and without notifying the Union changed the work hours of its employees, reduced employee overtime hours, changed its vacation policy, laid off bargaining unit employees, and changed its health insurance. I find the amendments by the General Counsel adding the vacation policy and health insurance were closely related to the timely filed charges and were within 6 months of the timely filed charges. *Redd-I, Inc.*, 290 NLRB 1115 (1988); *Citywide Service Corp.*, 317 NLRB 861, 862 (1995).

## CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening its employees with termination and discipline for engaging in union activities, by threatening its employees with the futility of the selection of the Union as their collective-bargaining representative and by creating the impression of surveillance of the employees' union activities.

4. Respondent violated Section 8(a)(3) of the Act by reducing the work hours of its employee Patrick Scott and by terminating Scott.

5. Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union and by instituting unilateral changes by changing the work hours of its employees, laying off employees, and by changing the vacation policy and the health insurance plan without notifying the Union and affording the Union an opportunity to request bargaining prior to the institution of these unilateral changes.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent has engaged in several violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the purposes and policies of the Act.

It is recommended that upon demand of the Union the Respondent immediately rescind the unlawful unilateral changes initiated by Respondent, restore the status quo ante and upon request by the Union, within 10 days, engage in bargaining with the Union concerning any proposed changes thereto. It is recommended that Respondent offer Patrick Scott full reinstatement to his former position or to a substantially equivalent position if his former position no longer exists without prejudice to his seniority or other rights or privileges previously enjoyed or to which he would have been entitled in the absence of the discrimination against him from the date of his discharge and expunge from its records any references to the unlawful reduction in his hours and his discharge. It is recommended that Respondent make Scott whole for the unlawful reduction in his hours and for his unlawful discharge and make whole those employees whose working hours were reduced in December 2000, and those employees it laid off on February 19, 2001, without prior negotiation with the Union and make whole the employees for any loss suffered by the unilateral change in the vacation and health insurance plans. These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed *in New Horizons for the Retarded*, 283 NLRB 1173 (1987), at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 USC Section 6621.

[Recommended Order omitted from publication.]